IN THE SUPREME COURT

STATE OF ARIZONA

MARTIN RIVERA-LONGORIA Petitioner, vs. THE HONORABLE DAN SLAYTON, Judge of the Superior Court of the State of Arizona, in and for the County of Coconino, Respondent Judge, STATE OF ARIZONA, through DAVID W. ROZEMA, Coconino County Attorney, Real Party in Interest.	)	Arizona Supreme Court No. CV-10-0362-PR Court of Appeals, Division One 1 CA-SA 10-0068 Coconino County Superior Court No. CR2008-0785

AMICUS CURIAE BRIEF OF THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL IN SUPPORT OF REAL PARTY IN INTEREST, STATE OF ARIZONA

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I. INTRODUCTION

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) represents more than 800 state, county, and municipal prosecutors. APAAC's primary mission is to provide training to Arizona's prosecutors. APAAC also provides a variety of other services to and on behalf of prosecutors. For instance, APAAC acts as a liaison for prosecutors with the legislature and the courts. In this role, APAAC may advocate prosecutorial interests before the legislature or proposes changes to this Court's procedural rules. On occasion, APAAC submits amicus curiae briefs in state or federal appellate courts on issues of significant concern. This is one of those occasions.

Most, if not all, of the prosecutors APAAC represents engage in some form of plea bargaining to dispose of criminal cases quickly and justly. The Court of Appeals' decision affects the ability of prosecutors working in Superior Court to engage in meaningful plea negotiations. No published appellate decision has previously interpreted the provisions of Rule 15.8 so broadly or in a manner so invasive of prosecutorial discretion. For those reasons, APAAC joins with the real party in interest in asking this Court to accept jurisdiction of the State's Petition for Review to resolve this matter of statewide importance.

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II. ARGUMENT

A. The Court of Appeals' decision rewrites Rule 15.8 contrary to the rules of statutory construction, greatly expanding the reach of the rule.

In its decision interpreting Rule 15.8, Arizona Rules of Criminal Procedure, the Court of Appeals redefined the term "deadline" to include the withdrawal of a plea offer when no date by which the offer must be accepted is specified in advance. *Rivera-Longoria v. Slayton*, __ P.3d __, ¶ 15, 2010 WL 410 2906 (App. 2010). This expansion of the definition of "deadline" contradicts the common-sense definition of the term and the rules of statutory construction.

When interpreting rules, the court must apply "fundamental principles of statutory construction, the cornerstone of which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction." *State v. Hansen*, 215 Ariz. 287, 289, 160 P.3d 166, 168 (2007) (internal citations omitted). Applying a "practical and commonsensical construction" to the interpretation of words ensures predictability by deterring speculation over the meaning of commonly used terms. *See Cochise County v. Faria*, 221 Ariz. 619, 622, 212 P.3d 957, 960 (App. 2009).

There is nothing ambiguous about the term "deadline." The Court of Appeals acknowledged this when it stated "*the term 'deadline' is not ambiguous on its face*." *Rivera-Longoria* at ¶ 9 (emphasis added). When a term is

unambiguous, the inquiry must end. The Court "will not extend a statute to include matters not within its express provisions." *State v. Denny*, 116 Ariz. 361, 365, 569 P.2d 303, 307 (App. 1977).

Rather than concluding its inquiry at the unambiguous definition of deadline, the Court of Appeals expanded the definition to include a previously unspecified withdrawal date. When a deadline is not specified before it passes, every plea offer has a potential deadline and every offer is subject to Rule 15.8. If, when drafting the rule, this Court had intended Rule 15.8 to apply to cases in which a plea offer is withdrawn regardless of whether a deadline was specified in advance, it could have explicitly said so.

The fact that the Court did not do so means the common-sense definition of "deadline" as a date specified *in advance of its passing* is the only correct interpretation and one that conforms to the rules of statutory construction. By rejecting the common-sense definition of "deadline", the Court of Appeals expanded the reach of the rule to include virtually every plea offer made by the state.

B. The expansion of Rule 15.8 to prohibit prosecutors from withdrawing a plea offer violates Article III of the Arizona Constitution.

Because the Court of Appeals' decision expanded Rule 15.8 to apply to any Superior Court case in which a plea offer is made, the Rule almost certainly violates Article III of the Arizona Constitution. Arizona courts have specified four

factors to consider in determining whether an unconstitutional usurpation of powers exists: (1) "the essential nature of the power being exercised"; (2) the degree of control exercised by the court and whether it is a "coercive influence or a mere cooperative venture"; (3) "the nature of the objective sought" by the court, meaning "[i]s the intent … to cooperate with the executive … or is the objective [to establish] its superiority over the executive department in an area essentially executive in nature"; and (4) "the practical result of the blending of powers". *Hancock v. Registrar of Contractors*, 142 Ariz. 400, 405, 690 P.2d 119, 124 (App. 1984).

1. Plea bargaining is an essential executive function.

It is axiomatic that plea bargaining is an essential function of the executive branch. "Our country's legal system vests broad discretion in prosecuting attorneys. This discretion exists in the exercise of plea bargaining negotiations." *State v. Morse*, 127 Ariz. 25, 32, 617 P.2d 1141, 1148 (1980).

2. The Court of Appeals' decision greatly expands the court's coercive influence on plea negotiations.

By limiting the ability of the state to withdraw a plea offer, the court is unquestionably acting in a coercive manner. In *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000), the Court of Appeals rejected a separation of powers claim relating to the creation of a post-trial remedy requiring the state to reinstate a plea offer *after* the court found a defendant was prejudiced by ineffective

assistance of counsel. It justified its admittedly coercive influence as a "*rare*, *limited*, and justifiable encroachment on the prosecutor's power." *Id*. at 417, 10 P.3d at 1204 (emphasis added). The enactment of Rule 15.8 in 2003 was based upon the principle set forth in *Donald*. See Rule 15.8, comment. The Rule expanded that encroachment to coerce the prosecutor to reinstate an offer *before* trial and before any finding that defense counsel was ineffective. Now, the Court of Appeals has further encroached on the prosecutor's role by extending Rule 15.8's reach to the withdrawal of an offer. This is a far greater degree of control than the court has ever exercised over the state's plea bargaining function.

The degree to which the court now seeks to exercise control over the plea negotiation process goes beyond *Donald*'s "rare" and "limited" cases. If the *Donald* decision is a valid expression of the court's duty to remedy a constitutional violation, the expansion of Rule 15.8's application to all pre-trial plea negotiations has the effect of moving the court's role from a limited remedial function to the exercise of dominion over the prosecutor's power to engage in plea bargaining.

3. Expanding the reach of Rule 15.8 does not assist the executive branch; it establishes the court's superiority over the entire plea bargaining process.

The third factor in the *Hancock* test is the objective of the exercise. In *Donald*, the court held that the objective of its limited coercive action was to remedy a constitutional violation that prejudiced the defendant. *Donald*, 198 Ariz.

at 417, 10 P.3d at 1204. However, the nature of the remedy goes beyond the stated constitutional objective and, with the Court of Appeals' expansion of Rule 15.8, establishes the court's superiority over the entire plea negotiation process.

Donald has been called into question by the United States Supreme Court in *United States v. Ruiz*, 536 U.S. 622, 122 S.Ct. 2450 (2002). In *Ruiz*, the Supreme Court held that the U.S. Constitution does not require the prosecutor to disclose material impeachment evidence prior to entering a plea agreement with the defendant. In fact, the Constitution "does not require complete knowledge of the relevant circumstances" and permits the court to accept a guilty plea even when the defendant labors under a factual misapprehension. *Id*. at 630, 122 S.Ct. at 2456. Without a constitutional limitation on the plea bargain function, the discretion to set a time to negotiate a plea remains squarely with the prosecutor.

Moreover, this Court limited *Donald's* reach in *State ex rel. Thomas v. Rayes (Reynaga)*, 214 Ariz. 411, 153 P.3d 1040 (2007). In *Reynaga*, this Court held that the trial court cannot order reinstatement of a plea offer in the absence of a defendant's showing that counsel's performance prejudiced the outcome of his case. *Id*. at 414, 153 P.3d at 1043. An ineffective counsel claim made prior to conviction and sentence is "grossly premature." *Id*., citing *United States v. Gray*, 382 F.Supp. 898, 910 (E.D. Mich. 2005). Indeed, "a conclusion that a defendant has been prejudiced by deficient performance before disposition of the charges at

the trial level is purely speculative." *Id*. at 415, 153 P.3d at 1044. Nevertheless, Rule 15.8 permits the trial court to engage in such speculation – first, in the more limited number of cases in which the state imposes a plea deadline and now in nearly all cases in which an offer is made.

Even if *Donald* remains good law, the Court of Appeals' interpretation of Rule 15.8 goes well beyond its limitations. *Donald* acknowledged that once the state engages in plea bargaining, the defendant has the right to be "adequately informed of the consequences before deciding whether to accept or reject the offer." *Donald,* 198 Ariz. at 413, 10 P.3d at 1200. In this case, the Court of Appeals declared that the defendant must have "all material information" before deciding whether to accept a plea offer. *Rivera-Longoria* at ¶ 13.

Petitioner had a *Donald* hearing where he was informed of the consequences (i.e. potential sentence) he faced under the offer and those he faced at trial. *Rivera-Longoria* at ¶ 2. The fact that the prosecutor later disclosed additional material did not change the consequences. Therefore, by prohibiting withdrawal of a plea offer even after a *Donald* hearing, the Court of Appeals' decision set a far more expansive standard than one reasonably tailored to ensure the defendant receives effective assistance of counsel. Although the court has an interest in ensuring a defendant receives effective counsel, it is not the duty of the court to intrude on an essential executive function to ensure a defendant receives

perfect counsel. *See State v. Stanley*, 123 Ariz. 95, 106, 597 P.2d 998, 1009 (App. 1979) (defendant has no right to "the most effective counsel available").

Furthermore, the failure of Rule 15.8 to balance the interests of the state when ostensibly seeking to prevent ineffective assistance of counsel shows that the court's intrusion into the state's plea bargaining function has no cooperative motive. Previously unforeseen circumstances may arise in the course of trial preparation that lead the prosecutor to withdraw an offer in good faith. For example, the victim may change his mind and object to an offer or a new witness may come forward.

The text of Rule 15.8 does not permit consideration of such circumstances in deciding whether to impose sanctions, only whether subsequently disclosed information "materially impacted the defendant's decision" to accept the offer. Because the decision to plead guilty rests upon a defendant's subjective intent, the rule does not set an objective standard by which a prosecutor can determine whether newly-disclosed information is material to a defendant's decision to plead guilty and thus affects the date by which he may reasonably withdraw an offer. Without that knowledge, the "deadline" for plea negotiations is set at the court's discretion. Accordingly, the court has unquestionably assumed superiority over the executive's essential function.

4. The practical effects of the Court of Appeals' decision are far reaching and will strain judicial and prosecutorial resources.

Finally, the court must consider the practical effects of the decision. Because the state often cannot know what evidence either the defendant or the court will consider "material" for purposes of accepting a plea offer, fast-track guilty pleas will become more rare. Serious and/or complex cases will take longer to move to final disposition. Moreover, prosecutors will become reluctant to engage in plea negotiations altogether for fear of opening the door to preclusion under Rule 15.8.

This Court has held that "once a trial begins, a prosecutor … has less reason to negotiate a plea bargain than prior to trial. A decision within a prosecutor's office to cut off plea bargaining … follows logically from one of the reasons for engaging in plea bargaining: judicial economy through the avoidance of trials." *State v. Morse*, 127 Ariz. 25, 32, 617 P.2d 1141, 1148 (1980). This rationale also applies any time the state has spent significant resources preparing for trial and is especially true in serious and complex cases where the parties engage in significant disclosure long after the disclosure deadline in Rule 15.1(c).

The Supreme Court noted that it can be difficult to "characterize impeachment information as critical information of which the defendant must always be aware prior to pleading guilty given the random way in which such information may, or may not, help a particular defendant." *Ruiz,* 536 U.S. at 630,

122 S.Ct. at 2455. As noted above, when material information is difficult to determine in advance, there is no objective standard by which a prosecutor can reasonably withdraw a plea offer without running afoul of Rule 15.8. Consequently, the practical effect of the newly expanded rule is to prevent a prosecutor from withdrawing an offer, even during trial.

This frustrates the purpose of plea bargaining as a way to quickly dispose of cases. The rule already does this by effectively requiring a prosecutor to set a deadline at least 60 days after arraignment. See Rule 15.1(c)(1). That deadline must be set even later if the defendant discloses evidence the state chooses to rebut. Reading Rule 15.8 in conjunction with Rule 15.3(d)(3), which sets the deadline for disclosure of defense witness felony records no later than 30 days before trial, the state cannot withdraw a plea offer *on the day of trial*. This obliterates this Court's previously acknowledged purpose of plea bargaining to ensure "prompt and early disposition of cases, saving judicial, prosecutorial and penal resources." *Morse* at 32, 617 P.2d at 1148.

A recent Greenlee County case provides a good example of this dynamic at work. The plea offer in a sex abuse case finally expired in July 2010, after extensions requested by defense counsel. The defendant listed approximately twenty-three defense witnesses, including co-workers who were alleged alibi witnesses, but delayed setting interviews of those witnesses. After the interviews,

the prosecutor then had to obtain records from the defendant's employer to rebut the alibi. The court extended an interview cutoff date to thirty days before trial. After the interview deadline passed, the defendant asked to reopen plea negotiations. Because the prosecutor was concerned about suppression of the supplemental disclosure necessitated by the defendant's delay in scheduling interviews, he reopened the plea. The defendant pled guilty shortly before the November trial date, but only after discovery was complete. In cases like this, it is easy for the defendant to engage in tactical gamesmanship designed to force the state to reopen a plea offer through dilatory discovery tactics.

The natural course of the discovery process in serious and complex cases means that the state can in good faith disclose Rule 15.1(b) information until shortly before trial. By requiring all "material" information to be disclosed thirty days before withdrawing a plea offer, the court has put the state in the position of either keeping an offer open indefinitely or declining to engage in plea bargaining altogether. This puts an unnecessary strain on the scarce resources of the criminal justice system and violates the separation of powers.

III. CONCLUSION

APAAC respectfully urges this Court to accept jurisdiction of the State's Petition for Review and grant relief. The expansion of Rule 15.8 will have a significant and wide-ranging impact on the criminal justice system, leading to a

waste of judicial, prosecutorial and penal resources or the evisceration of plea negotiations altogether.

RESPECTFULLY SUBMITTED this __ day of December, 2010.

By: _____
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CERTIFICATE OF SERVICE

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STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

SUBSCRIBED AND SWORN to before me this ___ day of December, 2010.

_____
Notary Public

My Commission Expires:

_____

CERTIFICATE OF COMPLIANCE

Under Rule 6(c) and Rule 23(c) of the Arizona Rules of Civil Appellate Procedure, I certify that the attached Brief uses proportionately spaced type of 14 points or more, is double-spaced using a roman font, and contains 3382 words.

DATED this __ day of December, 2010.

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